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Supreme Court, U.S.
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No. 06-801

IN THE

Supreme Court of the United States

IN THE MATTER OF: JOHN E. SHAVERS,
INVOLUNTARY
DEBTOR

JOHN E. SHAVERS, *PRO SE*

Petitioner

v.

UNITED STATES FIRE INSURANCE COMPANY,
A DELAWARE CORPORATION, SHAVERS-WHITTLE,
CONSTRUCTION, INC., A LOUISIANA CORPORATION,
PETITIONING CREDITORS,

Respondents

On Petition for Writ of Certiorari to the
United States Court of Appeals for the Fifth Circuit

PETITION FOR WRIT OF CERTIORARI

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QUESTIONS PRESENTED FOR REVIEW

Introduction:

The United States Bankruptcy Court for the Eastern District of Louisiana, the United States District Court for the Southern District of Mississippi and the United States Fifth Circuit Court of Appeals misinterpreted the clear language and misapplied the Congressional statute Title 11:109(g)(1)(2) United States Code, prohibition against serial filings within 180 days, which applies to both voluntary and involuntary bankruptcy petitions and failed to dismiss the involuntary petition, *without prejudice,* of an ineligible involuntary debtor. The United States District Court for the Southern District of Mississippi lacked jurisdiction over the bankruptcy appeal from Ordered Relief of Involuntary Chapter 11 Bankruptcy rendered by the United States Bankruptcy Court for the Eastern District of Louisiana due to the fact that the appeal was never docketed in the United States District Court for the Eastern District of Louisiana and transferred to the Unite States District Court for the Southern District of Mississippi pursuant to the mandatory jurisdictional requirement of Title 28:158(a)(1)(3), United States Code. A Federal Court is a court of limited jurisdiction; the interpretation and application of Title 11:109(g)(1)(2) United States Code in a national bankruptcy scheme is fundamental to the even-handed, non-discriminatory treatment of debtors under the United States Bankruptcy Code.

I. WHETHER TITLE 11:109(g)(1)(3) "BANKRUPTCY ABUSE AND PREVENTION ACT" UNITED STATES CODE APPLIES EQUALLY TO VOLUNTARY AND INVOLUNTARY BANKRUPTCY REPEAT SERIAL FILINGS? WHETHER APPLICATION OF TITLE 11 109(g)(1)(2) IS MANDATORY? IS SECTION 109 ELIGIBILITY JURISDICTIONAL?

II. WHETHER JOHN E. SHAVERS WAS DENIED SUBSTANTIVE AND PROCEDURAL DUE PROCESS

OF LAW UNDER THE FIFTH AMENDMENT UNITED STATES CONSTITUTION AND EQUAL PROTECTION OF THE LAW UNDER TITLE 11:109(g)(1)(2) UNITED STATES CODE BY TWO SERIAL FILINGS OF BANKRUPTCY WITHIN 180 DAYS, THE SECOND FILING AN INVOLUNTARY BANKRUPTCY PETITION BY PETITIONING CREDITORS, UNITED STATES FIRE INSURANCE COMPANY AND SHAVERS-WHITTLE CONSTRUCTION, INC.?

III. WHETHER A PRELIMINARY INJUNCTION AGAINST JOHN E. SHAVERS "PROHIBITING PAYMENT OF ANY DEBTS WHEN DUE" IN UNITED STATES FIRE INSURANCE COMPANY V. JESCO CONSTRUCTION CORPORATION, JESCO CONSTRUCTION CORPORATION OF MISSISSIPPI, EMERALD CORPORATION, JOHN E. SHAVERS, JAMES M. STOCKSTILL, AND PHYLLIS M. STOCKSTILL, CIVIL ACTION: 03-CV-2906, UNITED STATES DISTRICT COURT FOR THE SOUTHERN DISTRICT OF NEW YORK, APRIL 25, 2003, MAY 2, 2003, MAY 12, 2003 AND JUNE 2, 2003, PROHIBITS UNITED STATES FIRE INSURANCE COMPANY'S SUBSEQUENT STANDING AS PETITIONING CREDITOR, IN RE: JOHN E. SHAVERS, 03-15899 JAB, UNITED STATES BANKRUPTCY COURT FOR THE EASTERN DISTRICT OF LOUISIANA, AUGUST 5, 2003, TO FILE INVOLUNTARY CHAPTER 11 BANKRUPTCY PETITION, "NOT PAYING DEBTS WHEN DUE", TITLE 11:303(h)(1) UNITED STATES CODE AS A VIOLATION OF DUE PROCESS OF LAW RIGHTS OF JOHN E. SHAVERS UNDER THE FIRST AND FIFTH AMENDMENTS, UNITED STATES CONSTITUTION AND RENDERS THE INVOLUNTARY CHAPTER 11 BANKRUPTCY UNCONSTITUTIONAL?

IV. WHETHER AN INVOLUNTARY BANKRUPTCY WITHOUT SUBJECT MATTER JURISDICTION AND VENUE VIOLATES JOHN E. SHAVERS' DUE PROCESS RIGHTS UNDER THE EQUAL PROTECTION OF LAW GUARANTEE UNDER TITLE 28:1408 UNITED STATES CODE AND THE FIRST AND FIFTH AMENDMENTS UNITED STATES CONSTITUTION?

V. WHETHER THE DENIAL OF APPEAL FROM ORDERED RELIEF OF INVOLUNTARY CHAPTER 11 BANKRUPTCY UNDER TITLE 28:158(a)(1)(3) UNITED STATES CODE AND THE SUBSEQUENT CONVERSION TO INVOLUNTARY CHAPTER 7 WHILE APPEAL PENDING VIOLATES THE DUE PROCESS RIGHTS OF JOHN E. SHAVERS UNDER TITLE 11:303(h)(1) UNITED STATES CODE?

VI. WHETHER THE BANKRUPTCY COURT OFFICER, HONORABLE JERRY A. BROWN UNITED STATES BANKRUPTCY COURT FOR THE EASTERN DISTRICT OF LOUISIANA VIOLATED JOHN E. SHAVERS' DUE PROCESS RIGHTS AGAINST DISPARATE TREATMENT UNDER THE LAW TITLE 28:109(g)(1)(2), TITLE 28:1408 UNITED STATES CODE RENDERING THE INVOLUNTARY CHAPTER 11 BANKRUPTCY UNCONSTITUTIONAL?

LIST OF PARTIES AND CORPORATE DISCLOSURE STATEMENT

I. United States Fire Insurance Company, a Delaware corporation, which at the time of filing as Petitioning Creditor against John E. Shavers, involuntary Chapter 11, August 5, 2003, was a New York corporation, domiciled at 110 William Street, New York, New York, Mississippi Privilege License #7700965. New York corporate existence terminated December 29, 2003, by merger with newly formed Delaware domestic insurance corporation, MJR Fire Insurance Company, the survivor. MJR Fire Insurance Company changed its name, coextensive with Merger, to United States Fire Insurance Company, December 29, 2003, domiciled at 2711 Centeville Road, Suite 4001, Wilmington, New Castle County, Delaware, 19808, Mississippi Privilege License: 0300045. United States Fire Insurance Company, A Delaware corporation, without substitution for New York USFI, Petitioning Creditor, converted Chapter 11 involuntary bankruptcy In Re: John E. Shavers, 03-55427 SEG, United States Bankruptcy Court for the Southern District of Mississippi, January 9, 2004.

II. United States Fire Insurance Company is solely owned by Crum & Forster Holding Company. Crum & Forster Holding Company is solely owned by Fairfax Financial Holding Company of Canada, the parent, doing business as "the Fairfax Group" a publicly held corporation.

III. John E. Shavers is a resident and domiciliary of Pensacola, Florida, P.O. Box 13127, Telephone 850-255-5300. At the time of the filing of Involuntary Chapter 11 Bankruptcy Petition by United States Fire Insurance Company and Shavers-Whittle Construction, Inc., John E. Shavers was a resident and domiciliary of the State of Texas, domiciled at 1699 Romano Park Lane, Suite 533, Houston, Texas 77090.

IV. William J. Perry, Daniel Lund III and Norman A. Mott, with the law firm of Shields Mott Lund LLP, 650 Poydras Street, Suite 2400, New Orleans, LA 70130, represent United States Fire Insurance Company, a Delaware corporation, without substitution under Rule 25, Federal Rules of Civil

Procedure, Rule 43, Federal Rules of Appellate Procedure and formerly represented Petitioning Creditor, United States Fire Insurance Company, a New York corporation, prior to merger with MJR Fire Insurance Company, a Delaware corporation, December 29, 2003.

V. Louis Modugno and Eric Hughes, with the law firm of McElroy, Deutsch, Mulvane & Carpenter LLP, 1300 Kemble Avenue, Morristown, New Jersey, 07962, represented United States Fire Insurance Company, a New York Corporation, in obtaining a Preliminary Injunction against John E. Shavers, April 25, 2003, in United States Fire Insurance Company, a New York Corporation v. John E. Shavers, et al, Civil Action: 03-CV-2906, United States District Court for the Southern District of New York, Prohibiting Shavers from "paying any debts when due", under penalty of Contempt of the New York Federal Court, posted a set bond of $25,000.00 By USFI's subsidiary North River Insurance Company, then subsequently filed as Petitioning Creditor against John E. Shavers, involuntary Chapter 11, In Re: John E. Shavers, Bankruptcy Case: 03-15899 JAB, August 5, 2003, for "not paying any debts when due". The Preliminary Injunction is on appeal to the United States Court of Appeals for the Second Circuit, Civil Appeal: 03-7573, filed by John E. Shavers, April 25, 2003, Civil Appeal: 03-7587 and Civil Appeal 03-7695.

VI. Shavers-Whittle Construction Inc., Petitioning Creditor/ insider, is a Louisiana corporation for profit, domiciled in Mandeville, Louisiana, solely incorporated by John E. Shavers, majority shareholder with pre-emptive Shareholder's Rights who served as Vice President, on date of Petition filing, August 5 2003, In Re: John E. Shavers, Bankruptcy Case: 03-15899 JAB, United States District Court for the Eastern District of Louisiana.

VII. Mr. Joseph E. Friend, Breazeale, Sachse & Wilson, LLP, 909 Poydras Street, Suite 1500, New Orleans, Louisiana 70112-4004, is the attorney for Petitioning Creditor/insider, Shavers-Whittle Construction, Inc.

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JURISDICTIONAL STATEMENT

Jurisdiction is conferred on the Honorable Justices, United States Supreme Court, pursuant to Article III, Section 2, cl.2, United States Constitution, as this case arises under the Constitution and Laws of the United States, specifically, Title 11 United States Code, popularly known as the United States Bankruptcy Code and the First and Fifth Amendments, United States Constitution. Specific statutory provisions conferring jurisdiction are Title 11:109(g)(1)(2), Title 11:303(h)(1), and Title 28:158(a)(1)(3), Title 28:1334(a) United States Code.

The Order Denying Motion to dismiss and order of Chapter 11 involuntarily relief was entered on October 16, 2003. Petition for Rehearing was timely filed and rehearing ordered relief was denied on November 19, 2003. Petition for rehearing motion to dismiss filed, but outstanding.

Memorandum and Order Affirming Ordered Relief of Chapter 11 entered February 1, 2005, Honorable Louis Guirola, U.S. District Court, Southern District of Mississippi. Timely appeal taken to United States Fifth Circuit.

On May 24, 2006, Honorables Garwood, Davis, and Garza Circuit Judges affirmed Ordered Relief Involuntary Chapter 11.

Petition for rehearing decision affirming Ordered Relief timely filed and denied June 29, 2006.

Petition for Writ of Certiorari timely filed, September 27, 2006, United States Supreme Court. Deficiency issued October 4, 2006.

Re-submission timely filed, December 4, 2006.

STATEMENT OF THE CASE

On January 10, 2003, Petitioner, John E. Shavers filed a Voluntary Petition for Bankruptcy protection pursuant to Chapter 11 of Title 11, United States Code in the United States Bankruptcy Court for the Eastern District of Louisiana, due to severe heart problems which made it impossible to run his business as structured, In Re: John E. Shavers, Bankruptcy Case: 03-10225.

On February 6, 2003, petitioner underwent open heart surgery in Slidell Memorial Hospital, Slidell, Louisiana. Subsequently, John Shavers filed a Motion to Voluntarily Dismiss through Counsel and on April 22, 2003, the Honorable Jerry A. Brown, United States Bankruptcy Court for the Eastern District of Louisiana, dismissed *with prejudice* Shavers' voluntary Chapter 11 bankruptcy petition.

In his decision, Judge Brown held that "I grant the Motion to Dismiss, but it's a dismissal *with prejudice* under 109(g) and that means the Debtor cannot file again for 180 days." Further opining Judge Brown stated, "It doesn't mean, of course, that [U.S.Fire] can't file an involuntary if [it] choose[s] to do so." [Bankr. E.D. La. No.03-10225, Docket No. 113, page 12].

Judicial Notice must be taken that Judge Brown never suggested that United States Fire file an involuntary bankruptcy petition against John E. Shavers within the following 180 days.

On or about April 25, 2003, United States Fire Insurance Company, a New York corporation, filed a Petition for Preliminary Injunction against John E Shavers and his businesses seeking to enjoin and prohibit him from "paying any debts when due," under an exclusive forum clause in the United States District Court for the Southern District of New York, Civil Action: 03-CV-2906. The Preliminary Injunction issued on or about May 12, 2003, by the Honorable Shira Schiendlin. United States Fire posted a set bond of $25,000.00, and Shavers timely appealed to the United States Court of Appeals for the Second Circuit, Civil Appeals: 03-7573, 03-7587; 03-7605.

On or about August 5, 2003, [within the 180 day dismissal with prejudice of the first voluntary Chapter 11 bankruptcy] *pro se* petitioning creditors, Barbara Ellen Elliott, Hal Elliott, and James Stockstill, downloaded a two-page boiler plate Form 5 involuntary bankruptcy petition from the internet an filed an involuntary Chapter 11 bankruptcy petition against John E. Shavers in the United States Bankruptcy Court for the Eastern District of Louisiana, Bankruptcy Case: 03-15899 JAB. United States Fire Insurance Company, Shavers-Whittle Construction, Inc., Herbert J. Stelly, Sr. and James A. Koerber intervened by *Ex parte Petition and Order* as

Petitioning Creditors.

John E. Shavers, a Citizen and resident of the State of Texas, filed a timely Motion to Dismiss prior to Answer, Bankruptcy Rule 1011(a)(b)© for lack of subject matter and in personam jurisdiction due to the fact that none of the Petitioning Creditors qualified under Title 11:303 United States Code and an Amended Motion to Dismiss under Title 11 Section 109(g)(1)(2) United States Code stating his ineligibility to be a statutory debtor due to his previous voluntary dismissal with prejudice of a bankruptcy proceeding within 180 days, and further stating the fact that jurisdiction and venue were improper in the United States Bankruptcy Court for the Eastern District of Louisiana due to his non-residency, lack of domicile and lack of assets in the State of Louisiana.

On October 7, 2003, John E. Shavers filed a Petition for Writ of Mandamus; Injunctive Relief; Withdrawal of Reference, and Request for Indemnification Bond in the United States District Court for the Eastern District of Louisiana, Civil Action: 03-2814, allotted to the Honorable Mary Ann Vial Lemmon, District Court Judge, to determine jurisdiction pursuant to Title 11 Section 109(g) United States Code and to grant all equitable and legal relief, citing the following requisites of Section 109(g)(1)(2) from the previous bankruptcy:

1. On February 27, 2003, John Deere Construction & Forestry Equipment Company obtained an Order Lifting Stay.
2. On March 13, 2003, Ford Motor Credit Company obtained an Order Lifting Stay.
3. On March 26, 2003, Caterpillar obtained an Order Terminating Stay against John E. Shavers.
4. On April 22, 2003, the Honorable Jerry A. Brown dismissed the Chapter 11 bankruptcy filing In Re: John E Shavers, Case Number: 03-10225, **WITH PREJUDICE.**
5. On August 5, 2003, petitioning creditors Barbara Ellen Elliott; Robert Harrell Elliott; and James Stockstill filed an Involuntary Petition for Chapter 11 Bankruptcy Relief against your petitioner in the United States Bankruptcy Court for the

Eastern District of Louisiana, Case Number: 03-15899-JAB.

6. On September 26, 2003, the Honorable Jerry A. Brown granted the Motion of United States Fire Insurance Company, a New York corporation's *Ex parte* Motion [without notice and hearing] for Expedited Hearing to Compel Rule 2004 Examination of John Ed Shavers and/or Contempt on the 10th day of October 2003 at 9:00 a.m. o'clock.
7. Timely Notice of Appeal of Discovery Order to the United States District Court for the Eastern District of Louisiana filed by John E. Shavers, *pro se* [Docket #54, fee paid $105.00] September 18, 2003.
8. Judicial Notice may be taken that Title 11, Section 109(g) United States Bankruptcy Code prohibits John E. Shavers from being a debtor under the United States Bankruptcy Code for Ordered Chapter 11 Relief and petitioning creditors, United States Fire Insurance Company, are of full knowledge of the prohibition of Title 11, Section 109(g) due to the fact that both were disputed creditors in the previous Chapter 11 Bankruptcy Dismissal with prejudice.

On October 9, 2003, the Honorable Mary Ann Vial Lemmon denied the Writ of Mandamus, Prohibition, stating:

> Shavers' remaining arguments are properly addressed to the bankruptcy court in the first instance, and the record reflects that Shavers has filed both a motion to require his creditors to post an indemnification bond (Document 85) and a Motion to Dismiss (Documents 50 and 84) in his bankruptcy proceeding. Shavers may appeal adverse rulings to this court. *See generally* 28 U.S.C. Section 158. The court denies Shavers request for a stay of this Order and Reasons pending appeal, and has not shown that the balance of equities weighs heavily in favor of granting a stay.

On October 10, 2003, the Honorable Jerry A. Brown granted

Ordered Relief of Involuntary Chapter 11, *prior to ruling on Shavers' Motion to Dismiss for lack of subject matter and in personam jurisdiction.* The Motion to Dismiss is still pending and is incorporated in a separate *de jure appeal* presently pending in the United States Fifth Circuit Court of Appeals from a dismissal *with prejudice.* [In Re: John E. Shavers, Civil Appeal: 06-30106, based upon the *res judicata* effects of this instant *de fact appeal.*

The timely appeal of Ordered Relief of Chapter 11 Involuntary Bankruptcy [Docket #164, Appeal fee paid, November 10, 2003] was erroneously docketed in the United States District Court for the Southern District of Mississippi In Re: John E. Shavers, Involuntary Bankruptcy Case: 03-55729 SEG after transfer of the case subsequent to appeal by the Honorable Jerry A. Brown for improper venue, November 4, 2003, to the United States Bankruptcy Court for the Southern District of Mississippi, in derogation of Title 28:158(a)(1)(3) United States Code by the Clerk of the United States Bankruptcy Court for the Southern District of Mississippi, January 16, 2004, as Civil Action: 1:04CV27 and affirmed without jurisdiction by the Honorable Louis Guirola, United States District Court Judge for the Southern District of Mississippi.

Regarding Title 11 Section 109(g), the Court found that Section 109(g) is "intended to prevent serial filings by a debtor by permitting the court to restrict the debtor's ability to file a case within 180 days after dismissal where the debtor has voluntarily dismissed her case after a motion for relief from the automatic stay has been filed," citing *In Re: Harper-Elder, 184 B.R. 403, 407 (Bkrtcy D. Dist. Col. 1995)*

> "The bankruptcy court articulated this understanding of Section 109(g) during the hearing on Shavers' motion to voluntarily dismiss his previous bankruptcy, stating: 'I grant the Motion to Dismiss, but it's a dismissal with prejudice under 109(g), and that means that the Debtor cannot file against for 180 days. If doesn't mean, of course, that [U.S Fire] can't file an involuntary if [it] choose[s] to do so.' Mr. Shavers did not "initiate" the involuntary bankruptcy case,

thus his objection founded on 11 U.S.C. Section 109(g) is without merit.

On July 6, 2005, the Clerk of the United States Bankruptcy Court for the Eastern District of Louisiana belatedly docketed the *De Jure* Notice of Appeal [Docket #164, In Re: John E. Shavers, Bankruptcy Case: 03-15899 JAB] from Ordered Relief and Motion to Dismiss in In Re: John E. Shavers, Bankruptcy Case: 03-15899 JAB and on August 12, 2005, the Honorable Jerry A. Brown vacated the Court's ruling due to appeal. Shavers timely appealed both rulings to the United States District Court for the Eastern District of Louisiana, as Amended Notices of Appeal.

On January 4, 2006, the Honorable Lance Africk dismissed the pending appeal with prejudice, and Shavers timely appealed to the United States Fifth Circuit Court of Appeal, Civil Appeal: 06-30106, which *de jure appeal is pending.*

On May 24, 2006, the Honorable Circuit Court Judges of the United States Fifth Circuit Court of Appeals affirmed the Ordered Relief of Chapter 11, Civil Appeal: 05-60143, citing the fact in footnote 1, page 4 that Civil Appeal: 06-30106 In Re: John E. Shavers is pending before another panel.

A timely Petition for Rehearing and a Petition for Stay of the Mandate were filed from Affirmance Order of Chapter 11 Relief. Rehearing was denied June 29, 2006. This Petition for Writ of Certiorari is timely.

ARGUMENT

REASON WHY WRIT OF CERTIORARI SHOULD ISSUE FOR MANDATORY DISMISSAL PURSUANT TO TITLE 11:109(g)(1)(2) UNITED STATES CODE

Title 11, Section 109(g) United States Bankruptcy Code is clear and unambiguous as "who may be a debtor," and provides in relevant part:

III. John E. Shavers is a resident and domiciliary of Pensacola,

Florida

g) Notwithstanding any other provision of this section, no individual or family farmer may be a debtor under this title who has been a debtor in a case pending under this title at any time in the preceding 180 days if-

(1) the case was dismissed by the court for willful failure of the debtor to abide by orders of the court, or to appear before the court, or to appear before the court in proper prosecution of this case; or

(2) the debtor requested and obtained the voluntary dismissal of the case following the filing of a request for relief from the automatic stay provided by Section 362 of this title.

Collier on Bankruptcy, Fifteenth Edition, Revised] Vol. 2 Section 303.02[2]:

> Section 303(a) provides that involuntary cases can be commenced only against a person that may be a debtor under chapter 7 or chapter 11. This implicated several other Bankruptcy Code provisions: the definition of person in section 101 and eligibility for chapter 7 and 11 contained in subsections 109(b) and (d)

Section 303.02[8] provides further:

> Section 109(g) is designed to deal with the problem of repeat filers. Unfortunately, it has an unexpected and seemingly unintended intersection with section 303(a). Section 109(g) provides that an individual debtor or family farmer who has been a debtor in a previous code cannot be a debtor against for a period of 180 days if such case was dismissed for willful failure of the debtor to abide by orders of the court or the debtor requested and obtained voluntary dismissal following a request for a lifting of the automatic stay. This arguably means, at least based on the language of that statute,

that an involuntary petition may not be filed against this debtor during this 180 day period. If the debtor is absconding with creditor assets during the 180 days, does not want to be a debtor any longer and is precluded from being a "debtor" under section 109(g) section 303(a) would not be available to creditors.

Section 303.02[9] provides:

Dismissal of the erroneous petition is one possible remedy for debtor ineligibility, a result that could harm both petitioning and non petitioning creditors since the date of the filing of the petition governs the date the stay commences and the date for determining preferences.

> "The purpose of the Code is to provide relief to debtors while at the same time, dealing equitably with creditors, eligibility of a debtor goes to the heart of the Code. Congress, through the political process and through exhaustive hearings and research, has attempted to strike a balance between relieving debtors and repaying creditors. In do doing, it has set broad limits on the eligibility of a debtor. To allow a court to vary these requirements, for whatever reason would effectively allow a court to rewrite the Code as it sees fit and to upset the balance Congress ha set. If a court can vary subsection (g)(2) then what prevents it from varying other subsections of Section 109?"
>
> "For example, a court might choose to vary Section 109(3) to allow a small corporation to go to Chapter 13, or to vary Section 109(b) to allow a railroad to liquidate under Chapter 7.
>
> Article I, section 8, clause 4 of the Constitution delegates to Congress the authority to establish a uniform system of

> bankruptcy. Thus, Congress may set a national policy for affording various types of relief to debtors and for protecting various creditors. If a court can vary the mandates of Congress which do not violate some other constitutionally protected right, then it is usurping a congressional power by rewriting the "uniform system of bankruptcies." Taken to an extreme, the Code would degenerate into a non-entity as a court applied whatever standard it saw fit to use.
>
> The courts that have interpreted Section 109(g)(2) as mandatory are correct when they say that if the law should be changed, then Congress should be the one to change it. [See, *In Re Denson,* 56 Bankr. 543, 546 (Bankr. N.D. Alsa. 1986; *In Re: Keziah,* 46 Bankr. 552, 555 (Bankr. W.D.N.C. 1985)
>
> Whenever possible, courts should apply statutes as they are written and not rewrite them in order to effect their independent judgment on an issue. [Comments "Must Courts Apply Section 109(g)(2) When Debtors Intend No Abuse in an Earlier Dismissal of Their Case?" 7 Bankr. Dev. J. 109 1990]

The Writ of Certiorari should be granted as there exists a conflict by and between the Congressional intent of Congress to provide "equality of the law" to all eligible debtors in a national scheme, the various Circuit Courts of Appeal; law review and journal articles; Cowan and Collier's Bankruptcy treatises, and to deny bankruptcy jurisdiction to ineligible debtors as a matter of law, in a court of improper venue.

The Writ of Certiorari should further issue to the United States Court of Appeals for the Fifth Circuit as an involuntary debtor cannot be denied his procedural and substantive rights inherent in the First and Fifth Amendments, United State Constitution of having the Bankruptcy Court, the District Court and the United States Fifth Circuit Court of Appeals rule on a Rule 12(b)(6) Motion to Dismiss

and Amended Motion to Dismiss prior to adjudication on the merits and Ordered Relief of Involuntary Chapter 11 Bankruptcy.

Bankruptcy Rule 1011 (a)(b)(c) allows an involuntary debtor to select the procedural vehicle of Motion to Dismiss to decline the Court's jurisdiction prior to Answer.

> "Defenses and objections to the petition shall be presented in the manner prescribed by Rule 12 F.R.Civ.P. and shall be filed and served within 20 days after service of summons.

Service of a motion under Rule 12(b) F.R.Civ.P. shall extend the time for filing and serving a Responsible pleading as permitted by Rule 12(a) F.R.Civ. P.

John E. Shavers cannot be denied his right to file an Answer, prior to trial on the merits, under the Equal Protection Guarantee of the United States Constitution and the First and Fifth Amendment as an involuntary debtor. The adjudication of Ordered Involuntary Relief prior to Answer and ruing on Motion to Dismiss is unconstitutional and requires reversal of Ordered Relief of Involuntary Chapter 11 and mandatory dismissal of the involuntary bankruptcy under Title 11:109(g)(1)(2) United States Code.

Moreover, the Ordered Relief of Involuntary Chapter 11 should be vacated due to the lack of subject matter jurisdiction and in personam jurisdiction of the United States Bankruptcy Court for the Eastern District of Louisiana by the Court's own admission of lack of bankruptcy court jurisdiction on the record on November 4, 2006, in Motion to Transfer for Improper Venue, transcript at page 20, subsequent to entering Ordered Relief of Involuntary Chapter 11, October 16, 2003, prior to ruling on Motion to Dismiss and the granting of the right to *pro se* involuntary debtor [now represented by counsel] to file an Answer as required by law, prior to adjudication on the merits:

MR. MODUGNO: The debtor did file his petition in this case voluntarily on January 10, 2003.

He averred under penalty of perjury under oath that he was a resident domicile-domiciliary of Louisiana.

THE COURT: Well, I never bought that; I never accepted that. I was going to transfer the case before I dismissed it.

VENUE OF CASES UNDER TITLE 11

Except as provided in section 1410 of this title, a case under title 11 may be commenced in the district court for the district—

(1) in which the domicile, residence, principal place of business in the United States or principal assets in the United States, of the person or entity that is the subject of such case have been located for the one hundred and eighty days immediately preceding such commencement. (Title 28:1408 United States Code)

The facts of the two-page boiler plate involuntary petition (Official Form 5) discloses under *penalty of perjury* the following:

Street Address: 1699 Romano Park Lane, Suite 533
Houston, Texas

Mailing Address: 535 Cross Gates Blvd.
Slidell, LA 70461

Location of Principal Assets of Business Debtor:
6378 Bayou Road, Belle Chase [sic] LA 70037

Venue: Debtor has been domiciled or has had a residence, principal place of business, or principal assets in the District for 180 days immediately proceeding the date of

his petition or for a longer part of such 180 days than in any other district.

The debtor is a person against whom an order for relief may be entered under title 11 of the United States Code.

The debtor is generally not paying such debtor's debts a they become due, unless such debts are the subject of a *bona fide* dispute.

CONCLUSION

Mandatory dismissal is required of the involuntary bankruptcy petition under Title 11:109(g)(1)(2) United States Code as Title 11:109(g)(1)(2) under the separation of powers as enacted by Congress, Title 11:109(g)(1)(2) United State Code as the statute is clear and unambiguous, applies to both eligibility of both voluntary and involuntary debtors as written. For the Court to deny the benefit of Title 11:109(g)(1)(2) United States Code to John E. Shavers, an involuntary debtor, the Affirmance of Ordered Relief, prior to ruling on Motion to Dismiss is unconstitutional, under the due process and equal protection of the laws guaranteed to John E. Shavers by the United States Constitution.

In the instant case, the debtor properly selected a Motion to Dismiss on the mandatory grounds of Title 11:109(g)(1)(2) United States Code. The appeal of the failure of the Bankruptcy Court to rule on involuntary debtor's Motion to Dismiss in over three years, an interlocutory appeal, while adjudicating Ordered Relief of Involuntary Chapter 11 Bankruptcy and further adjudicating conversion to involuntary Chapter 7 while Ordered Relief/Order Denying Motion to Dismiss are subject to appeal, while debtor is subject to a Preliminary Injunction issued by the New York Federal Court "not to pay any debts when due" under penalty of contempt of court is fundamentally unfair and denies debtor Access to Courts under the First Amendment and due process of law under the Fifth

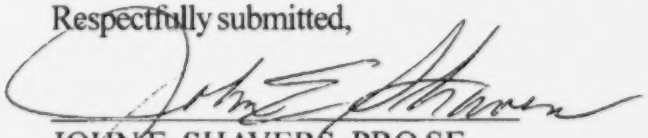
Amendment, United States Constitution.

Requisite venue is lacking to confer jurisdiction on the Louisiana Court to Order Involuntary Relief due to the fact that John E. Shavers is a resident and domiciliary of the State of Texas under Title 28:1408 United States Code.

Over 400,000 citizens of the United States in Louisiana, Mississippi and Alabama have lost their homes in the aftermath of Hurricane Katrina and under the Bankruptcy Abuse and Prevention Act of 205, serial filings are prohibited within 180 days, by Act of Congress, applicable to both involuntary and voluntary petitions.

The Judgment of Affirmance of Ordered Relief should be reversed and the case remanded for dismissal under Title 11:109(g)(1)(2) United States Code, and Rule 12 Federal Rules of Civil Procedure, as the United States Fifth Circuit Court of Appeals has decided an important federal question in a way that has so far departed from the accepted and usual course of judicial proceedings, or sanctioned such a departure by a lower court, to call for an exercise of this Court's supervisory power by the issuance of a Writ of Certiorari.

Respectfully submitted,



JOHN E. SHAVERS, PRO SE
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APPENDIX

UNITED STATES BANKRUPTCY COURT
EASTERN DISTRICT OF LOUISIANA

ORDER
BROWN, J
OCTOBER 10, 2003
ENTERED OCTOBER 16, 2003

IN RE: BANKRUPTCY NO. 03-15899
SECTION "B"
JOHN E. SHAVERS CHAPTER 11

DEBTOR(S)

This matter came before the Court on October 10, 2003 as a hearing on the following:

1) Petition of Shavers-Whittle Construction, Inc., U.S.Fire Insurance Co., Herbert Stelly, Sr. and James A. Koerber, petitioning creditors, requesting involuntary relief against John E. Shavers under Chapter 11 (P-1);

2) Motion of John E Shavers to dismiss involuntary petition (P-50);

3) Motion of Herbert J. Stelly, Sr. to transfer case to the Southern District of Mississippi (P-11);

4) Motion of U.S. Fire Insurance Co. to compel 2004 examination of John E Shavers and for contempt (P-59); and

5) Motion of U.S. Fire Insurance Co. to appoint Chapter 11 Trustee or, in the alternative, to convert the case to Chapter 7 (P-65)

PRESENT: WILLIAM J. PERRY
LOUIS A. MODUGNO
Counsel for U.S. Fire Ins. Co.

JOSEPH E. FRIEND
Counsel for Shavers-Whittle Construction, Inc.

ARTHUR S. MANN III
Counsel for Herbert J. Stelly, Sr.

R. A. OSBORNE
Counsel for James Stockstill

MICHAEL VINCENZO
Counsel for GE Capital

DIANA L. RACHAL
Counsel for U.S. Trustee

STEPHEN PANNIS
Counsel for James Koerber

DOUGLAS GOFF
Appeared for John E. Shavers

Matthew J. Doucet
Gerard M. Whittle
Herbert J. Stelly, Sr.
John E. Shavers
Witnesses

(Exhibits are filed in the Court's Exhibit Room)

Considering the arguments of counsel,

IT IS ORDERED that the motion of John E. Shavers to

dismiss involuntary petition is DENIED. The Court will enter a separate order for relief under Chapter 11.

The Court will hold a further hearing on Tuesday, November 4, 2003 at 10:00 A.M., on the remaining motions, which are:

Motion of Herbert J. Stelly, Sr. to transfer case to the Southern District of Mississippi (P:-11);

Motion of U.S. Fire Insurance Co. to compel 2004 examination of John E. Shavers and for contempt (P-59); and

Motion of U.S. Fire Insurance Co. to appoint Chapter 11 Trustee or, in the alternative, to convert the case to Chapter 7 (P-65).

New Orleans, Louisiana, October 15, 2003.

s/ J.A. BROWN
J. A. BROWN
BANKRUPTCY
JUDGE

ENTERED OCTOBER 16, 2003
UNITED STATES BANKRUPTCY COURT
EASTERN DISTRICT OF LOUISIANA
CLERK OF COURT

UNITED STATES BANKRUPTCY CURT
EASTERN DISTRICT OF LOUISIANA

IN RE: JOHN E. SHAVERS
DEBTOR

NUMBER: 03-15899
03-15899
SECTION "B"
CHAPTER 11

FILED
CLERK OF COURT
UNITED STATES BANKRUPTCY COURT
EASTERN DISTRICT OF LOUISIANA
OCTOBER 16, 2003

ORDER FOR RELIEF UNDER CHAPTER 11

Considering the Petition for Involuntary Relief under Chapter 11 of the Bankruptcy Code having been filed by Shavers-Whittle Construction, Inc., U.S. Fire Insurance Co;, Herbert Stelly, Sr. and James A. Koerber against John E. Shavers on August 5 2003 and the hearing held on October 10, 2003,

IT IS ORDERED that Relief under Chapter 11 of the Bankruptcy Code be and to Hereby is GRANTED against JOHN E. SHAVERS.

IT IS FURTHER ORDERED that JOHN E. SHAVERS file complete mailing matrix with this Court no later than OCTOBER 30, 2003.

IT IS ORDERED that JOHN E. SHAVERS file with the Court no later than OCTOBER 30, 2003 a list containing the names and addresses of the 20 largest unsecured creditors, excluding insiders.

IT IS FURTHER ORDERED that JOHN E. SHAVERS file with the Court no later than OCTOBER 30, 2003 their Statement of Affairs, Schedule of Assets and Liabilities, a Schedule of Current Income and Expenditures, a Statement of Executory Contracts and a Complete Mailing Matrix.

IT IS FURTHER ORDERED that JOHN E. SHAVERS, Debtor herein, comply with all provisions of the Bankruptcy Code and Rules.

New Orleans, Louisiana, October 15, 2003.

s/ J. A. Brown
JERRY A. BROWN
BANKRUPTCY JUDGE

IN THE UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF MISSISSIPPI
SOUTHERN DIVISION

SOUTHERN DISTRICT OF MISSISSIPPI
FILED: FEB 01 2005
BY: s/ M. Dederea Deputy
M. Dederea

IN RE: CIVIL CASE NO. 1:04CV27
BANKRUPTCY CASE NO.
JOHN E. SHAVERS 03-55729-SEG

MEMORANDUM OPINION AND ORDER
AFFIRMING ORDER OF BANKRUPTCY COURT

THE MATTER BEFORE THE COURT is Debtor John E. Shavers' appeal of ab order rendered by the United States Bankruptcy Court for the Eastern District of Louisiana. In response to the Debtor's brief in support of his appeal, an interested party, United States Fire Insurance Company ("U.S. Fire") has filed a brief in support of the Bankruptcy Court's order. After due consideration of the submissions and the relevant law, it is the Court's opinion that the Bankruptcy Court's order which is the subject of this appeal should be affirmed.

DISCUSSION

I. PROCEDURAL HISTORY

A. *John E. Shavers' Prior Voluntary Bankruptcy*

On or about January 10, 2003 John E. Shavers filed a Voluntary Petition for Bankruptcy protection pursuant to Chapter 11 of the Bankruptcy Code in the United States Bankruptcy Court for the Eastern District of Louisiana. *In Re Shavers,* No. 03-10225. Thereafter, Mr. Shavers filed a motion to dismiss his bankruptcy petition. On April 16, 2003, United States Bankruptcy Judge Jerry

A. Brown conducted a hearing on the matter and dismissed Shavers' bankruptcy petition with prejudice. In his ruing, Judge Brown held that "I grant the Motion to Dismiss, but it's a dismissal with prejudice under 109(g) and that means that the Debtor cannot file again for 180 days. It doesn't mean, of course, that (U.S. Fire) can't file an involuntary if [it] choose[s] to do so." (Ex. 4)1

B. *John Shavers' Involuntary Bankruptcy*

On or about August 5, 2003, three creditors filed an involuntary bankruptcy petition against John E. Shavers pursuant to Chapter 11 of the United States Code, in the United States Bankruptcy Court for the Eastern District of Louisiana, under the caption, *In re John E. Shavers,* petition no. 03-15899 (the "Involuntary Bankruptcy") (Ex.5). Asserting a $1.5 million unsecured debt, U.S. Fire filed a motion to join as a petitioning creditor against Mr. Shavers. (Ex.6). On September 17, 2003, the Louisiana Bankruptcy Court granted U.S. Fire's motion to join as a petitioning creditor against John Shavers. (Ex. 7)

Mr. Shavers filed a motion to dismiss the involuntary bankruptcy petition arguing:

(1) the court lacks subject matter and in personam jurisdiction because John Shavers is precluded from being a debtor pursuant to 11 U.S.C. Section 109(g); and

(2) the court lacks subject matter and in personam jurisdiction because the petitioning creditors do not qualify as creditors pursuant to 11 U.S.C. Section 303 (b) and (c).

(Ex. 8) U.S. Fire filed an opposition to Mr. Shavers motion to dismiss the involuntary petition and filed a cross-motion seeking the appointment of a trustee. (Ex. 10 & 11).

On October 10, 2003, the bankruptcy court conducted a trial in connection with, among other things, (1) Mr. Shavers' motion to dismiss the involuntary petition and (2) U.S. Fire's motion to appoint a trustee. During the trial, the court heard testimony from numerous witnesses, including Mr. Shavers himself, and was presented with

1 Exhibit numbers refer to the record excerpt filed by U.S. Fire Insurance Company, which is Significantly more comprehensive than the record transmitted by the bankruptcy court.

evidence regarding Mr. Shavers' debts and his efforts to hinder, delay and defraud his creditors. Based on the testimony and evidence presented during the trial, the court denied Shavers' motion to dismiss the involuntary petition. The court held that 1) 11 U.S.C. Section 109(g) did not prohibit the Petitioning creditors from filing an involuntary bankruptcy petition against Shavers; and 2) the requirements of 11 U.S.C. Section 303 regarding the qualifications of petitioning creditors were satisfied (Ex. 15, page 69].

The court concluded:

All right, I've considered the evidence that's been elicited here and I find that the Debtor is generally not paying the Debtor's debts as the debts become due and I find that the debts he's not paying are not the subject of a bona fide dispute. They're in the name of judgments and notes and other non-contingent liabilities. There's been no evidence put on to counter the evidence that proves the Debtor is not paying his debts. For those reasons I enter an order of Relief in this case that the Chapter 11 is permitted and that it will go forward.

(Ex.15). Thereafter, the court entered a written Order for relief under Chapter 11 on October 15, 2003. (Ex.14)

Mr. Shavers' involuntary bankruptcy was subsequently transferred to the United States Bankruptcy Court for the Southern District of Mississippi by Order dated November 4, 2003. (Ex. 16).

C. *Appellant's Grounds for Appeal and the Legal Standard*

Shavers argues that 1) this Court lacks jurisdiction over this appeal and, thus the appeal must be re-transferred to the United State District Court for the Eastern District of Louisiana; and

2) his rights were violated because the Order for Relief was entered before Mr. Shavers was able to file an answer to the involuntary petition within 10 days after his motion to dismiss was denied by the Court. Shavers argues alternatively that this cause should be dismissed pursuant to 11 US.C. Section 109 because he is not an eligible debtor under that Code section.

Generally, a bankruptcy court's findings of fact are reviewed for clear error while conclusions of law are reviewed de novo. *See Williams v. Int'l Bhd of Elec. Workers, Local 520 (In re Williams),* 337 F.3d 504, 508 (5yh Cir. 2003). Under the clearly erroneous standard, this Court will reverse "only if, on the entire evidence, we are left with the definite and firm conviction that a mistake has been made." *Walker v. Cadle Co. (In Re Walker),* 51 F.3d 562, 565 (5th Cit. 1995). However, when a bankruptcy court's finding of fact is premised on an improper legal standard, or a proper standard improperly applied, that finding is reviewed de novo. *See In re Missionary Baptist Found. of Am., Inc.,* 712 F.2d 206, 209 (5th Cit. 1983).

2. THE COURT'S JURISDICTION

Appeals to the District Court of final orders issued by the bankruptcy court are governed by 28 U.S.C. Section 158(a). That code section provides that an appeal to the District Court of a final order issued by the bankruptcy court, "shall be taken only to the district court for the judicial district in which the bankruptcy judge is serving." See 28 U.S.C. Section 158(a) does not, as Shavers suggests, preclude a district court from transferring the venue of an appeal to another district court.

Here, Judge Brown issued an Order for Relief under Chapter 11 dated October 15, 2003. (Bankr. E.D. La. No. 03-15899, Docket No. 125]. Shavers subsequently filed a Notice of Appeal of the October 15, 2003 Order for Relief to the United States District Court for the Eastern District of Louisiana. [Bankr. E.D. La. No. 03-15899, Docket No 164]. The Appeal, therefore, was in fact taken to the district court in which Judge Brown served, the Eastern District of Louisiana. The United States District Court for the Eastern District of Louisiana, however, transferred the appeal to this Court due to the fact that Shavers' involuntary bankruptcy was transferred to the United States Bankruptcy Court for the Southern District of Mississippi.

Shavers' argument that this Court lacks jurisdiction over this appeal and, thus, the appeal must be re-transferred to the United

States District Court for the Eastern District of Louisiana, is without merit.

3. SHAVERS' OPPORTUNITY TO OBJECT TO THE INVOLUNTARY PETITION

Shavers next argues that his rights were violated because the bankruptcy court's Order for Relief was entered before Shavers was able to file an answer to the involuntary petition within 10 days after his motion to dismiss was denied by the Court.

U.S. Fire contends that this argument should be rejected and the Order for Relief affirmed because (1) Shavers presented his objections in his motion to dismiss the petition, (2) Shavers participated in and was represented by counsel during the trial in connection with the contested petition, and (3) the Order for Relief was entered after the bankruptcy court presided over a trial in which the testimony and evidence presented established that Shavers was not paying his debts as they became due.

Bankruptcy Code Section 303(h) provides, in relevant part, that in the event that a debtor challenges an involuntary petition,

> ...after trial, the court shall order relief against the debtor in an involuntary case under the Chapter under which the petition wad filed, only if-
>
> > The debtor is not paying such debtor's debts as such debts become due unless such debts are the subject of a bona fide dispute...

11 U.S.C. Section 303(h). Relief under Section 303(h) is mandatory where the requirements of the statute are met. *In re The Ceiling Fan Distributor, Inc.*, 37 B.R. 701, 702 (M.D. La. 1983).

Courts generally apply a totality of circumstances tests when determining whether to enter an Order for Relief, focusing on the number of unpaid claims, the amount of the claims, the materiality of nonpayment and the overall condition of debtor's financial affairs. *In re Concrete Pumping Serv.*, 943 F.2d 627 (6th Cir. 1991);

Liberty Tool & Mfg v Vortex Fishing Sys., Inc., 277 F.3d 1057 (9th Cir. 2001); *In re Arriola Energy Corp.*, 74 B.R. 784, 790 (S.D. Tex. 1987). Pursuant to Bankruptcy Rule 1013, where an involuntary bankruptcy petition is contested by the debtor, "the court shall determine the issues of [the] contested petition at the earliest practicable time and forthwith enter an order for relief, dismiss the petition, or enter any other appropriate order." *See* Fed. R. Bankr. P. 1013; *Wynn v. Eriksson,* 889 F.2d 644, n.1 (5th Cir. 1989). Rule 1013(a) is designed to allow creditors force bankruptcy courts to grant relief expeditiously and before the debtors remaining assets are squandered." *Wynn,* 889 F.2d at 646. The bankruptcy court complied with the requirements of Rule 1013 by presiding over a atrial in connection 2ith the contested involuntary petition on October 10, 2003. Shavers was present during that trial and was represented by counsel. (Ex. 15 pages 2 and 8).

Indeed, Mr. Shavers testified during that trial. (Ex. 15, page 97). The evidence presented during the trial, established that Shavers was not paying his debts when they became due. Further, there was evidence of fraudulent transfers presented. Based on the testimony and evidence presented during the trial, the court held that the requirements of 11 U.S.C. Section 303 had been met and that Shavers was not paying his debts as they became due. (Ex. 15, pages 69 and 72). Consequently, the court entered an Order for Relief. (Ex. 15).

Had Shavers filed an answer to the involuntary petition, as he claims he should have been allowed, the only effect would have been that the Order for Relief under 11 U.S.C. Section 303 could not be automatic, *In re Ceiling Fan,* 37 B.R. at 702, but rather the court would be required to conduct a trial to determine if the debtor was paying his debts as they became due.

See 11 U.S.C. Section 303(h); Fed. R. Bankr. P. 1013. Here Shavers contested the involuntary petition by filing a motion to dismiss. The bankruptcy court, in compliance with the statutory mandate of 11 U.S.C. Section 303, presided over a a trial regarding the contested petition Based on the evidence presented during that trial, the court held that Shavers was not in fact "paying his debts as

they became due" and accordingly entered an Order for Relief. Shavers had an opportunity to present evidence during the trial to contest the allegation that he was not paying his debts as they became due. The fact that the bankruptcy court found otherwise does not leave this Court with a definite and firm conviction that a mistake was made. The Court therefore finds that the requirements of 11 U.S.C. Section 303(h) were satisfied and the Order for relief properly entered.

Shavers' argument in the alternative, that this case should be dismissed pursuant to 11 U.S.C. 109 because he is not an eligible debtor, is also without merit. Section 109 of the Bankruptcy Code section prevents a debtor from re-filing a bankruptcy petition within 180 days following the dismissal of a prior bankruptcy.
Code section 109(g)(2) provides that

> [N]o individual...may be a debtor under this title who has been a debtor in a case pending under this title at any time in the preceding one hundred and eighty days if-
>
> > (2) the debtor requested and obtained the voluntary dismissal of the case following the filing of a request for relief from the automatic stay provided by section 362 of this title.

11 U.S.C. Section 109(g).

The purpose of this Code section is to prevent debtors from using repetitive filings as a method of frustrating creditor's efforts to recover what is owed them. *Matter of Ulmer,* 19 F.3d 234, 235 (5th Cir. 1994); *In re Munkwitz,* 235 B.R. 766 (E.D. Pa. 1999) (citing 2 Collier on Bankruptcy Section 109.08, 109.48 (15th ed. Revised 1999). "The section denies a debtor the opportunity to invoke repeatedly the automatic stay of Title 11. Without the section, a debtor could move in and out of bankruptcy, forcing a creditor to pursue time and again the right to collect a debt." *Matter of Ulmer,* 19 F.2d at 235.

"Being a debtor' under the statute means 'being allowed to initiate a bankruptcy case." *In re Cormier,* 147 B.R. 285, 288 (Bankr. D.

Maine 1992) citation omitted, emphasis added). A review of the legislative history of the Code Section 109(g) makes this clear. The pertinent Senate Report states, "The sections as amended will prohibit any party from filing a petition, who, within the previous six months, has had a previous petition dismissed upon voluntary motion for dismissal." *Id.*, citing S. Rep. 98-65 at 74 (98th Cong., 1st Sess.) (1983).

Section 109(g) is "intended to prevent serial filings by a debtor by permitting the forth to restrict the debtor's ability to file a case within 180 days after dismissal where the debtor has voluntarily dismissed her case after a motion for relief from the automatic stay has been filed." *In re Harper-Elder,* 184 B.R. 403, 407 (Bkrtcy D. Dist. Col. 1995). The bankruptcy court articulated this understanding of Section 109(g) during the hearing on Shavers' motion to voluntarily dismiss his previous bankruptcy, stating: "I grant the Motion to Dismiss, but it's a dismissal with prejudice under 109(g), and that means that the Debtor cannot file again for 180 days. It doesn't mean, of course, that [U.S. Fire] can't file an involuntary if [it] choose[s] to do so." (Ex. 4). Mr. Shavers did not "initiate" the involuntary bankruptcy case, thus his objection founded on 11 U.S.C. Section 109(g) is without merit.

The Court therefore finds that it has jurisdiction over this appeal and the bankruptcy court's October 15, 2003 Order for Relief was proper and should be affirmed.

IT IS THEREFORE ORDERED AND ADJUDGED that the bankruptcy court order which is the subject of this appeal is AFFIRMED. All motions pending in this case are hereby denied.

SO ORDERED AND ADJUDGED this the 1st day of February 2005.

S/ LOUIS GUIROLA, JR.
LOUIS GUIROLA, JR.
UNITED STATES DISTRICT JUDGE

IN THE UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT

UNITED STATES COURT OF APPEALS
FIFTH CIRCUIT
FILED
MAY 24, 2006
CHARLES FULBRUGE, III

NO. 04-60483

JOHN E. SHAVERS; ET AL Plaintiffs,
JASON EDWARD CARR, Plaintiff-appellant,

VERSUS

GEORGE DALE, ETC; ET AL,
GEORGE DALE, Insurance Commissioner, State of Mississippi;
WILLIAM H. ELLSWORTH; ALEXANDER J. ELLSWORTH;
ELLSWORTH, LEBLANC & ELLSWORTH INC.; UNITED
STATES FIRE INSURANCE COMPANY, A DELAWARE
CORPORATION
Defendants-Appellees.

No. 05-60143

In the Matter of: JOHN E. SHAVERS, Debtor

JOHN E. SHAVERS, Appellant,
versus
UNITED STATES FIRE INSURANCE COMPANY;

SHAVERS-WHITTLE CONSTRUCTION INC.,
Appellees.

No. 05-60574

In the Matter of: JOHN E. SHAVERS, Debtor

B. G. PERRY, Appellant,

Versus

DEWAYNE MURRAY, TRUSTEE; UNITED STATES FIRE INSURANCE CO., Appellees.

- - - - - - - - - - - - - - - - - -

Appeals from the United States District for the Southern District of Mississippi,
Jackson Division

- - - - - - - - - - - -

Before GARWOOD, DAVIS and GARZA, Circuit Judges.
PER CURIAM:

This appeal includes three consolidated cases related to the bankruptcy of John E. Shavers. The Shavers involuntary bankruptcy was originally filed in the Bankruptcy Court for the Eastern District of Louisiana. After the Louisiana bankruptcy court entered Court entered an order of relief under Chapter 11, it transferred the case to the Bankruptcy Court for the Southern District of Mississippi, because a related case had been removed to that jurisdiction. When Shavers appealed the order of relief, the Louisiana district court transferred the appeal to the district court for the Southern District of Mississippi.

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1 Pursuant to 5th Cir. R. 47.5, the Court has determined that this opinion should not be published and is not precedent except under the limited circumstances set forth in 5th Cir. R. 47.5.4

The Mississippi district court affirmed the order of relief. Shavers appeals from that order in Case No. 05-60143.

Based on our review of the record, the district court properly affirmed the order of relief. Shavers' argument that he is not an eligible debtor under 11 U.S.C. 109 is without merit. Entry of the bankruptcy court's order before Shaver filed an answer to the involuntary petition did not violate Shavers' rights as he had a full opportunity to present his case in the trial of his motion to dismiss the involuntary bankruptcy petition. The district court also properly rejected Shavers' argument that the court was without jurisdiction over the appeal because of the transfer of the case from Louisiana to Mississippi. The Louisiana Bankruptcy Court issued the order to transfer the case to the Mississippi Bankruptcy Court on November 4, 2003, on the same day the order was entered granting Chapter 11 relief. Shavers appealed the order granting Chapter 11 relief on November 10, 2003. Shavers' notice of appeal immediately transferred jurisdiction over the case from the bankruptcy court to the Louisiana district court. 10 Collier on Bankruptcy Section 8001.04. The Louisiana District Court clearly was within its authority to transfer the appeal to the Mississippi District where related proceedings were ongoing. See 28 U.S.C. Section 158(a) and 28 U.S.C. Section 1412. Although there is some confusion in the electronic records of the Louisiana District Court as to which

notice of appeal filed by Shavers was docketed and transferred to the Mississippi District Court, the two district courts that have examined the record have concluded that Shavers' appeal of the Chapter 11 order is the appeal that was docketed in the Louisiana District Court, and transferred to the Mississippi District Court where it was heard and decided and then appealed to this court. See Memorandum and Order, entered by the Mississippi District Court on February 1, 2003. See also Order and Reasons, entered by the

Louisiana District Court on January 5, 2006.1 We agree. Accordingly, we affirm case No. 05-60143 on the basis of the district court's Memorandum Opinion an Order Affirming Order of Bankruptcy Court entered on February 1, 2005.

Case no. 04-60483 is the appeal from the district court's denial of a motion to remand the civil case related to the Shavers Bankruptcy that had originally been filed in Mississippi State court. An order denying a motion to remand is not review able by appeal or otherwise. 28 U.S.C. Section 1334(d).
Accordingly we dismiss cased no. 04-60483.

Case No. 05-60574 is an appeal from an order of the Mississippi bankruptcy court ordering B. G. Perry to appear for an examination. The Mississippi district court properly held that

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1 The January 5, 2006 order of the Louisiana District Court was entered after Shaver's notice of appeal from the Chapter 11 Order was re-docketed in the Eastern District of Louisiana. Judge Africk found that Shaver's appeal had previously been docketed, transferred to the Mississippi Court and decided. That order is presently on appeal to this court before another panel under docket no. 06-30106.

It was not a final order and dismissed for lack of jurisdiction. 28 U.S.C. Section 158(d)(2)(A). Accordingly, we affirm case No. 05-60574.

Case No. 05-60143 AFFIRMED.
Case No. 04-60483, DISMISSED.
Case no. 05-60574, AFFIRMED.

IN THE UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT

UNITED STATES COURT OF APPEALS
FIFTH CIRCUIT
FILED
MAY 24, 2006

NO. 04-60483

JOHN E. SHAVERS; ET AL
Plaintiffs,
JASON EDWARD CARR,
Plaintiff-appellant,
VERSUS
GEORGE DALE, ETC; ET AL,
GEORGE DALE, Insurance Commissioner, State of Mississippi;
WILLIAM H. ELLSWORTH; ALEXANDER J. ELLSWORTH;
ELLSWORTH, LEBLANC & ELLSWORTH INC.; UNITED
STATES FIRE INSURANCE COMPANY, A DELAWARE
CORPORATION
Defendants-Appellees.

No. 05-60143

In the Matter of: JOHN E. SHAVERS, Debtor

JOHN E. SHAVERS, Appellant,
versus
UNITED STATES FIRE INSURANCE COMPANY;
SHAVERS-WHITTLE CONSTRUCTION INC.,,
Appellees.

No. 05-60574

In the Matter of: JOHN E. SHAVERS, Debtor

In the Matter of: JOHN E. SHAVERS, Debtor

B. G. PERRY, Appellant,

Versus

DEWAYNE MURRAY, TRUSTEE; UNITED STATES

FIRE INSURANCE CO., Appellees.

Appeal from the United States District Court for the Southern District of Mississippi, Jackson

ON PETITION FOR REHEARING

Before GARWOOD, DAVISK AND GARZA, Circuit Judges.

PER CURIAM:

IT IS ORDERED that the petition for rehearing is denied.

U.S COURT OF APPEALS
FILED
JUNE 29, 2006
CHARLES R. FULBRUGE III, CLERK

ENTERED FOR THE COURT;

s/ W. Eugene Davis
W. Eugene Davis
United States Circuit Judge
REHG-2